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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

INVESTMENT COMPANY INSTITUTE,

Petitioner,

v.

ROBERT L. CLARKE, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

In 1933, Congress enacted what this Court has twice characterized as the "flat prohibitions" of the Glass-Steagall Act, in order to separate, as completely as possible, commercial banks from the securities industry. And, in 1971, this Court held that those flat prohibitions prevent the Comptroller of the Currency from authorizing national banks in general, and Citibank in particular, to organize, sponsor and underwrite units of participation in an SEC-registered mutual fund. Little more than a decade later, with no change in his statutory powers, the Comptroller has again authorized national banks in general, and Citibank in particular, to organize, sponsor and underwrite units of participation in an SEC-registered mutual fund. The court below affirmed this ruling, announcing that Congress could overturn that result "if it finds itself in disagreement with the actions of the Comptroller or the courts." These questions are presented:

1. Where the Comptroller has articulated his disagreement with the fundamental policy decisions enacted by Congress in the Glass-Steagall Act, and where the Comptroller has been unsuccessful in obtaining legislation to implement his contrary policy views, is the judiciary obligated to acquiesce in and affirm agency rulings that eviscerate the Act's flat prohibitions by engrafting upon them *ad hoc* exceptions found nowhere in the statute itself?
2. Where Congress has taken the unusual step of expressly withholding from the Comptroller *any* regulatory authority whatsoever under the Glass-Steagall Act, and where Congress has expressly considered and rejected efforts by the Comptroller and the banking industry to grant commercial banks the particular IRA mutual fund authority at issue here, may an administrative agency nevertheless arrogate to itself the power to authorize bank IRA mutual funds and to attempt to ameliorate the resulting and conceded dangers under a self-created scheme of administrative regulation?

PARTIES TO THE PROCEEDING

In addition to the petitioner and respondents listed in the caption, the following are also respondents in this action: Office of the Comptroller of the Currency and Citibank, N.A.*

*Pursuant to Rule 28.1 of this Court, petitioner states as follows: the Investment Company Institute is the national association of open-end investment companies (commonly known as mutual funds), their investment advisers and their principal underwriters. The Institute has 1,620 mutual fund members with over 20 million shareholders and assets of approximately $540 billion.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
PETITION	1
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
A. Citibank's First Attempt To Enter The Mutual Fund Business	4
B. Citibank's Current Attempt To Enter The Mutual Fund Business	5
C. The Comptroller's Ruling	6
D. The District Court Decision	7
E. The Court Of Appeals Decision	8
REASONS FOR GRANTING THE WRIT	9
I. THE JUDGMENT BELOW EVISCERATES THE GLASS-STEAGALL ACT	12
A. The Judgment Below Authorizes Banks To Underwrite Securities In Direct Contravention Of This Court's Decision In *Camp* And The Will Of Congress By Endorsing A "Trust" Exception Predicated On Superficial Labels	12
B. By Approving The System Of *Ad Hoc* Administrative Regulation Previously Rejected By Congress And This Court, The Judgment Below Licenses Underwriting Activities That Foster The Very Hazards Congress Intended The Glass-Steagall Act To Eliminate	15
II. THE JUDGMENT BELOW REPUDIATES BOTH THE GLASS-STEAGALL ACT AND THIS COURT'S DECISIONS IN *CAMP* AND *BECKER* BY ALLOWING BANK REGULATORS TO USURP A POLICY-MAKING ROLE CONGRESS EXPRESSLY RESERVED FOR ITSELF	18
CONCLUSION	24

TABLE OF AUTHORITIES

Cases	PAGE
American Bankers Association v. *SEC*, C.A. No. 85-2482 (D.D.C. Oct. 30, 1985), *appeal pending*, No. 85-6055 (D.C. Cir.)	20
American Ship Building Co. v. *NLRB*, 380 U.S. 300 (1965)	21
Awotin v. *Atlas Exchange National Bank*, 295 U.S. 209 (1935)	13
BankAmerica Corp. v. *United States*, 462 U.S. 122 (1983)	15
BATF v. *FLRA*, 464 U.S. 89 (1983)	21
Board of Governors v. *Agnew*, 329 U.S. 441 (1947)	18
Board of Governors v. *Dimension Financial Corp.*, 106 S. Ct. 681 (1986)	9,21,23
Board of Governors v. *Investment Company Institute*, 450 U.S. 46 (1981)	3,10,13
Bowen v. *American Hospital Association*, 106 S. Ct. 2101 (1986)	20,22
Federal Deposit Insurance Corp. v. *Philadelphia Gear Corp.*, 106 S. Ct. 1931 (1986)	21
Federal Election Commission v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27 (1981)	21
Florida Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132 (1963)	11
Investment Company Institute v. *Camp*, 401 U.S. 617 (1971)	3,4,7 *passim*
Investment Company Institute v. *Clarke*, 630 F. Supp. 593 (D. Conn.), *aff'd mem.*, 789 F.2d 175 (2d Cir.), *petition for cert. filed*, __ U.S.L.W. __ (U.S. July 31, 1986) (No. 86-)	1,2,10
Investment Company Institute v. *Clarke*, C.A. No. C-86-0032-17 (W.D.N.C. filed Jan. 24, 1986)	10
Investment Company Institute v. *Conover*, 593 F. Supp. 846 (N.D. Cal. 1984), *rev'd sub nom. Investment Company Institute* v. *Clarke*, Nos. 84-2622, 84-2623 (9th Cir.), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. July 31, 1986) (No. 86-)	1,2,10 *passim*

PAGE

Investment Company Institute, v. *Conover*, 596 F.Supp. 1496 (D.D.C. 1984), *aff'd*, 790 F.2d 925 (D.C. Cir.), *petition for cert. filed sub nom. Investment Company Institute* v *Clarke*, ___ U.S.L.W. ___ (U.S. July 31, 1986) (No. 86-) 2

Investment Company Institute v. *FDIC*, 606 F. Supp. 683 (D.D.C. 1985), *appeal pending*, Nos. 84-1616, 85-5769 (D.C. Cir.) 19

Lowe v. *SEC*, 105 S. Ct. 2557 (1985) 21

NLRB v. *Financial Institute Employees*, 106 S. Ct. 1007 (1986) 21

Northeast Bancorp, Inc. v. *Board of Governors*, 105 S. Ct. 2545 (1985) 21

SEC v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344 (1943) 13

SEC v. *United Benefit Life Insurance Co.*, 387 U.S. 202 (1967) 13

SEC v. *VALIC*, 359 U.S. 65 (1959) 12

Securities Industry Association v. *Board of Governors*, 468 U.S. 137 (1984) ..... 3,4,7 *passim*

Securities Industry Association v. *Board of Governors*, 468 U.S. 207 (1984) 3

Securities Industry Association v. *Board of Governors*, 627 F. Supp. 695 (D.D.C. 1986), *appeal pending*, Nos. 86-5089, 5090, 5091, 5131 (D.C. Cir.) 18,19

Zuber v. *Allen*, 396 U.S. 168 (1969) 20

Statutes

Banking Act of 1933, 48 Stat. 162 2

Employee Retirement Income Security Act of 1974, 88 Stat. 832 ..... 5,8,9 *passim*

Glass-Steagall Act, Section 16, 12 U.S.C. § 24 (Seventh) ..... 2,12 *passim*

Glass-Steagall Act, Section 21, 18 U.S.C. § 318 ..... 2,12 *passim*

Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.* 4

Investment Advisers Act of 1940, 15 U.S.C. § 80b-1 *et seq.* 20

	PAGE
15 U.S.C. § 80b-2(a)(11)	20
I.R.C. § 408	9
I.R.C. § 408(a)(1)	14
I.R.C. § 408(h)	14
I.R.C. § 408(i)	14
Securities Act of 1933, 15 U.S.C. § 77a *et seq.*	4
Securities Exchange Act of 1934, 15 U.S.C. §§ 78(c)(4),(5)	19
12 U.S.C. § 92a	4,5,6
12 U.S.C. § 93a	17,21
12 U.S.C. § 1843(c)(8)	17
28 U.S.C. § 1254(1)	2
Legislative Materials	
H.R. Conf. Rep. No. 1631, 91st Cong., 2d Sess. (1970)	20
H.R. Conf. Rep. No. 1822, 74th Cong., 1st Sess. (1935)	17
H.R. Rep. No. 1382, 91st Cong., 2d Sess. (1970)	20
Hearings on H.R. 1539, H.R. 2747 and H.R. 2856 before the House Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs, 96th Cong., 2d Sess. (1979)	20
Hearings on S. 1686, S. 1703, S. 1720 and S. 1721 Before the Senate Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, Part II, 97th Cong., 2d Sess. (1981)	16,20
S. 1720, 97th Cong., 1st Sess. § 302 (1981)	16
S. 2490, 97th Cong., 2d Sess. § 10 (1982)	16
S. 2181, 98th Cong., 1st Sess. § 104(c) (1983)	16
S. 2851, 98th Cong., 2d Sess. (1984)	16

PAGE

Miscellaneous

Banks Will Seek New Authority From Fed If Securities Applications Are Approved, Wash. Fin. Rep., May 26, 1986 19

Commercial Paper Activities of Bankers Trust Company of New York Do Not Constitute Underwriting Securities, [1984-85 Transfer Binder] Fed. Bank L. Rep. (CCH) ¶ 86,270 (June 4, 1985) 18

Customers Pour Money Into Citibank's Portfolio IRA As Court Battle Continues On Glass-Steagall Charges, Am. Banker, Apr. 9, 1986 5

FDIC Statement of Policy on the Applicability of the Glass-Steagall Act to Securities Activities of Subsidiaries of Insured Non-member Banks, 47 Fed. Reg. 38,984 (1982) 19

Letter No. 362, [Current] Fed. Bank. L. Rep. (CCH) ¶ 85,532 (May 22, 1986) 19

New Bank Powers Unlikely But Farm Debt, Court Ruling Could Spur Congress To Act, Wash. Fin. Rep., Feb. 25, 1985 16

Response of the American Bankers Association to the Securities Activities of Commercial Banks Study Outline (May 1976) 14

26 Fed. Res. Bull. 393 (1940) 15

42 Fed. Res. Bull. 288 (1956) 13

48 Fed. Reg. 51,930 (1983) 19

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Investment Company Institute (the "Institute") respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in these proceedings on May 20, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (1a-23a)[1] is reported at 790 F.2d 925. The opinion of the United States District Court for the District of Columbia (24a-38a) is reported at 596 F. Supp. 1496. The administrative ruling of the Comptroller of the Currency ("Comptroller") authorizing Citibank, N.A. ("Citibank") to create, sponsor and underwrite the mutual fund at issue (39a-51a) is unreported.[2]

1. Citations herein to material printed in the Appendix appear as "(a)."

2. Filed concurrently with this petition are two other petitions for certiorari seeking review of appellate decisions which address the same issues presented here and which arise out of related mutual fund rulings issued by the Comptroller and challenged by the Institute. *Investment Company Institute* v. *Clarke*, __U.S.L.W. __(U.S. filed July 31, 1986) (No. 86-); *Investment Company Institute* v. *Clarke*, ___ U.S.L.W.

JURISDICTION

The judgment below was entered on May 20, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The flat prohibitions of two sections of the Glass-Steagall Act are involved in this action.[3] Section 16 of the Act provides, in part:

> [A national bank] shall not underwrite any issue of securities or stock * * *.

Section 21 of the Act provides, in part:

> [It] shall be unlawful * * * [f]or any * * * corporation * * * engaged in the business of issuing, underwriting, selling, or distributing * * * stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits * * *.

___(U.S. filed July 31, 1986) (No. 86-). The procedural history of these cases is as follows.

The Comptroller issued his first IRA mutual fund ruling on October 21, 1982, when he authorized Citibank, N.A. to engage in the mutual fund business (39a-51a). That ruling was affirmed by the United States District Court for the District of Columbia, 596 F.Supp. 1496, and by the United States Court of Appeals for the District of Columbia Circuit, 790 F.2d 925.

On January 27, 1984, the Comptroller authorized Wells Fargo Bank, N.A. (52a-66a) and Bank of California, N.A. (67a-68a) to underwrite IRA mutual funds. These rulings were struck down by the United States District Court for the Northern District of California, 593 F. Supp. 846, but were reinstated by a divided panel of the United States Court of Appeals for the Ninth Circuit, Nos. 84-2622, 84-2623 (9th Cir. June 30, 1986), essentially for the reasons stated by the D.C. Circuit.

Finally, the Comptroller approved the mutual fund of Connecticut Bank and Trust Company, N.A. (69a-90a) on February 7, 1985. The United States District Court for the District of Connecticut affirmed in a brief opinion, 630 F.Supp. 593, which in turn was summarily affirmed by the United States Court of Appeals for the Second Circuit, 789 F.2d 175.

3. What is generally known as the Glass-Steagall Act was enacted as part of the Banking Act of 1933, 48 Stat. 162, and is codified in various sections of Title 12 of the United States Code. Relevant to this action are Sections 16 and 21 of the Act, 12 U.S.C. §§ 24 (Seventh) and 378.

STATEMENT OF THE CASE

This case presents the latest effort of federal banking regulators administratively to repeal the flat prohibitions of the Glass-Steagall Act (the "Act"), the primary federal statute governing the basic structure of the financial services industry in this country. Although "Sections 16 and 21 [of the Act] *flatly* prohibit banks from engaging in the [securities] underwriting business,"[4] the Comptroller of the Currency, reversing over fifty years of long-standing construction and exercising rulemaking power expressly denied to him by Congress, has legislated a sweeping exception to this statutory bar, permitting Citibank to create, sponsor and underwrite the shares of its own mutual fund.

Wholly apart from overriding Congress' explicit, carefully considered and persistent refusal to authorize the very activities approved below, the Comptroller and the court below subverted this Court's decision in *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971) ("*Camp*"), which expressly holds that Sections 16 and 21 of the Act forbid commercial banks to engage in the mutual fund business.[5] The Comptroller and the court below also established the *ad hoc* "system of administrative regulation" of bank securities activities that Congress repeatedly has refused to authorize and that this Court has rejected as fundamentally inconsistent with the structure and purpose of Sections 16 and 21 of the Act. *Becker, supra*, 468 U.S. at 153-54.

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4. *Board of Governors* v. *Investment Company Institute*, 450 U.S. 46, 58 n.24 (1981) ("*Board of Governors*") (emphasis supplied). *Accord Securities Indus. Ass'n* v. *Board of Governors*, 468 U.S. 207, 217-20 (1984) ("*Schwab*"); *Securities Indus. Ass'n* v. *Board of Governors*, 468 U.S. 137, 156-57 (1984) ("*Becker*").

5. Separated in time by some 15 years, the present case and *Camp* illustrate how a tenacious administrative agency through a process of semantic manipulation can attempt to erode the express constraints of a statute with which it disagrees. As set forth below, in *Camp* the Comptroller engaged in a play on words by arguing that Citibank was not unlawfully engaged in the public offering of a mutual fund but was merely commingling managing agency accounts. A similar play on words lies at the heart of this case: the Comptroller argues that Citibank is not unlawfully engaged in the public offering of a mutual fund but is merely commingling Individual Retirement Account trusts.

In short, this case presents basic challenges, not only to Congress' substantive policy choice with respect to the scope of permissible bank securities activities, but also to Congress' structural decision to reserve to itself, rather than to delegate to any agency, the authority and responsibility for making that choice.

A. Citibank's First Attempt To Enter The Mutual Fund Business

The antecedents of this case date at least to 1965, when the Comptroller approved, as a permissible bank fiduciary service under 12 U.S.C. § 92a, a plan by Citibank to create, sponsor and underwrite a mutual fund in the form of commingling managing agency assets in a common trust fund. *Camp, supra,* 401 U.S. at 621-23.[6] Investors could participate in that mutual fund (known as the "Commingled Investment Account") by opening a bank account with Citibank of a specific size and signing a standardized, preprinted form designating Citibank as managing agent of the account. Citibank purchased for each investor "units of participation" representing his or her proportionate interest in the fund's assets, which consisted of an investment portfolio of corporate stocks and bonds. *Camp, supra,* 401 U.S. at 621-22.

At the insistence of the SEC, Citibank registered the Commingled Investment Account with the Commission as an open-end investment company (or mutual fund) under the Investment Company Act, and registered the units of participation in the mutual fund with the SEC as securities under the Securities Act. Citibank acted as investment adviser and principal underwriter to the Account, and began marketing its mutual fund shares to the

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6. "A mutual fund is an open-end investment company," *Camp, supra,* 401 U.S. at 625 n.11, regulated by the Securities and Exchange Commission ("SEC" or "Commission"). A mutual fund must be registered with the SEC under the Investment Company Act of 1940, 15 U.S.C. § 80a-1 *et seq.* ("Investment Company Act"), and shares in a mutual fund, which represent the investors' undivided and redeemable interests in the fund's investment portfolio, must also be registered with the SEC as "securities" under the Securities Act of 1933, 15 U.S.C. § 77a *et seq.* ("Securities Act").

segment of the investing public it had targeted, in competition with other mutual funds. *Id.*

In 1971, this Court held that the creation, sponsorship and operation of the Commingled Investment Account unlawfully involved Citibank "in the underwriting, issuing, selling, and distributing of [mutual fund] *securities* in violation of §§ 16 and 21 of the Glass-Steagall Act." *Id.* at 639 (emphasis supplied). This Court also held that bank operation of mutual funds potentially gives rise to the hazards that Congress sought to eliminate in enacting the Glass-Steagall Act. *Id.* at 637.

B. Citibank's Current Attempt To Enter The Mutual Fund Business

In 1982, Citibank again applied to the Comptroller for approval under 12 U.S.C. § 92a to create, sponsor and underwrite a mutual fund, this time in the form of commingling certain retirement account assets in a common trust fund. The bank proposed to underwrite the shares of its fund to the general public as investments for their Individual Retirement Accounts ("IRAs"), specifically earmarked investment accounts authorized by the Employee Retirement Income Security Act of 1974 ("ERISA").

After Congress authorized IRAs in 1974, banks offered a variety of bank instruments to attract IRA dollars, such as deposit accounts and certificates of deposit, but, until this case, banks had never asserted the authority to sponsor mutual funds and to underwrite their shares as IRA investments. "With interest rates on [bank] CDs low, IRA balances higher, and the stock market up," however, Citibank decided that "it has become increasingly important for banks to [offer investors] a mutual fund investment option."[7]

Accordingly, just as in 1965, Citibank organized a mutual fund, registered it with the SEC under the Investment Company Act, and registered the "units of beneficial interest" in the fund

7. *Customers Pour Money Into Citibank's Portfolio IRA As Court Battle Continues On Glass-Steagall Charges*, Am. Banker, Apr. 9, 1986 at 24.

with the SEC as "securities" under the Securities Act. The fund is structured and operates like a garden-variety mutual fund, and is identical in all material respects to the Citibank mutual fund struck down in *Camp*.

C. The Comptroller's Ruling

On October 21, 1982, the Comptroller approved Citibank's latest mutual fund plan in the first of a series of formal IRA mutual fund rulings. Although Citibank's mutual fund shares are registered as "securities" with the SEC, and despite this Court's holding in *Camp* that mutual fund shares are "securities" within the meaning of the Glass-Steagall Act, the Comptroller ruled that the shares in *this* Citibank mutual fund do not constitute "securities" for Glass-Steagall Act purposes. The Comptroller found it dispositive that Citibank intended to underwrite the shares in its fund only to investors who executed a standardized, preprinted, IRA trust agreement (43a). The Comptroller further ruled, as he had in 1965, that Citibank's plan constituted an appropriate exercise of fiduciary powers under 12 U.S.C. § 92a (40a), in this case because of the passage of ERISA (40a-42a).

The Comptroller also opined that this specific Citibank mutual fund likely would not give rise to the various hazards that this Court has held to exist whenever banks engage in the mutual fund business, since the Comptroller asserted that he could, by regulation, ensure that some (albeit not necessarily all) of the potential dangers would not mature into actual abuses (44a-45a). Finally, and for the very first time since Congress subjected bank common trust funds to the Glass-Steagall Act more than fifty years ago, the Comptroller waived the need for Citibank to comply with his own fiduciary regulations in order to enable Citibank to register the fund and the shares thereof with the SEC and to market those securities to the public (45a, 101a-102a). The

Comptroller accompanied his ruling with a press release heralding the "*new investment opportunities*" that Citibank's mutual fund would provide (101a-102a) (emphasis supplied).[8]

Citibank promptly launched its own aggressive promotional campaign to underwrite the shares of its mutual fund to the public. Asserting that its mutual fund "is better than most *mutual funds*" (93a) because it "gives you all the advantages of a *mutual fund* and more" (92a) (emphasis supplied), Citibank proclaimed that "[i]f you want to be in the *securities* market," its mutual fund is "just what the doctor ordered" (91a) (emphasis supplied).

The Institute then commenced this action, seeking injunctive relief and a declaration that the Glass-Steagall Act prohibits such "commercial bank involvement in marketing securities," as this Court had held in *Becker*, *supra*, 468 U.S. at 148, and *Camp*, *supra*, 401 U.S. at 639.

D. The District Court Decision

The District Court upheld the Comptroller's ruling. Observing that "a definition of [the term] 'securities' exists nowhere in Glass-Steagall itself" (30a), the court acquiesced in the Comptroller's determination that the term "securities" should not apply to shares in *this* mutual fund because the shares are underwritten "only" to those 111 million investors in the nation who are eligible to open IRAs and to execute IRA trust forms (31a-32a). The District Court further determined that the Comptroller acted "reasonably" in concluding that he could, by regulation, limit the

8. Ironically, the Comptroller recognized (45a-50a) that the SEC, applying this Court's decision in *Camp*, consistently has held that bank common trust funds (and shares therein) which are mass-merchandised to the public as investment vehicles must be registered under the federal securities laws. But, recognizing that the federal securities laws and the actions of the SEC demonstrated the invalidity of his ruling, the Comptroller attacked the SEC's "unwavering position" and refused to give the securities laws any effect (46a). During the ensuing IRA mutual fund litigation, however, the Comptroller disavowed this portion of the ruling, stating that he now "in no way argues that [Citibank's] Collective Fund, and interests therein, are not subject to registration under the securities laws" (106a).

dangers that prompted Congress to exclude commercial banks from the mutual fund business (33a-35a).

The District Court also deferred to the Comptroller's interpretation of ERISA, even though that statute is a tax and labor statute (and *not* a banking statute), and even though the Comptroller concededly had no involvement in Congress' consideration or passage of ERISA. Without citation of authority, the District Court concluded that, in enacting ERISA, Congress implicitly must have intended to sanction and authorize bank IRA mutual funds (31a), even though no discussion of an intent to repeal the Glass-Steagall Act is evidenced anywhere in the language or legislative history of ERISA.

E. The Court Of Appeals Decision

The Court of Appeals upheld the Comptroller's ruling, but *not* on the bases articulated either by the District Court or the Comptroller. It conceded the "intuitive appeal" of the Institute's position that *Camp* makes it unlawful for national banks to operate a mutual fund (8a), and acknowledged that Citibank is "offer[ing] a service that, in the eyes of [bank] customers and, apparently Citibank's marketing and advertising departments, looks very much like a mutual fund" (8a). Nevertheless, the court concluded that *Camp* should not "dictate the result" in this case (11a) because investors were required to sign preprinted "trust" forms (rather than the preprinted "managing agency" forms used in *Camp*) before being sold fund shares, and because the court's own economic judgment persuaded it that this Citibank SEC-registered mutual fund "is likely to be less risky" than the Citibank SEC-registered mutual fund struck down in *Camp* (8a-11a).[9]

9. The court's economic risk analysis (9a-11a) rested primarily on factors not mentioned by the Comptroller in his ruling (44a-45a) and solely on immaterial operational differences between Citibank's current mutual fund and the Citibank mutual fund struck down in *Camp*. Whereas the Citibank plan at issue in *Camp* allowed investments of between $10,000 and $500,000 per investor and permitted the shares to be used as collateral and to be transferred, the current Citibank plan generally limits *annual* investments to $2,000 per investor, does not

The court below also announced that it deemed itself bound to defer to the Comptroller's construction of the Glass-Steagall Act (12a-13a, 18a-19a). Notwithstanding this Court's holding in *Camp* that the term "securities" in the Glass-Steagall Act plainly encompasses bank mutual fund shares, *Camp*, *supra*, 401 U.S. at 625, and notwithstanding this Court's instruction in *Becker* that the treatment afforded instruments under the Securities Act provides "considerable evidence" of Congress' intent concerning the coverage of those instruments under the companion Glass-Steagall Act, *Becker*, *supra*, 468 U.S. at 150, the Court of Appeals declared itself to be without authority to reverse the Comptroller's contrary decision because it was presented in a written document and because the document advanced "plausible reasons" for the Comptroller's contrary views (19a-20a, 23a).[10]

REASONS FOR GRANTING THE WRIT

The opinion below, which affects the permissible scope of the securities activities of the more than 33,000 depository institutions in the nation, fundamentally misconceives the role of administrative agencies and courts in effectuating the basic policy decisions Congress has mandated in the financial services arena. In *Board of Governors* v. *Dimension Financial Corp.*, 106 S. Ct. 681, 689 (1986), this Court unambiguously held that if existing banking statutes do not serve the public interest, "that is a problem for Congress, and not the [banking agencies] or the courts, to address." The court below turned this basic precept on its head. It upheld the Comptroller's ruling that national banks may engage in the mutual fund business, in direct contravention of the Glass-Steagall Act's flat prohibitions and this Court's *Camp* decision, and then justified its decision by declaring that Congress

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permit the shares in the fund to be used as collateral, and prohibits transfer of the shares. *See* I.R.C. § 408.

10. Although the court below considered itself without power to reverse the Comptroller's construction of the Glass-Steagall Act, the Court of Appeals flatly rejected the Comptroller's interpretation of, and reliance upon, ERISA (14a), thereby rendering "not relevant" a crucial underpinning of the Comptroller's ruling.

"remains free to address the issue if it finds itself in disagreement with the actions of the Comptroller or the courts" (23a n.12).

Action by this Court is necessary to reaffirm the primacy of Congress' policy decision to "separat[e] as completely as possible commercial from investment banking." *Board of Governors*, *supra*, 450 U.S. at 70. The court below acquiesced in the Comptroller's efforts to engraft a "trust" exception onto the Glass-Steagall Act and to establish the very system of *ad hoc* administrative regulation of bank securities activities that Congress consistently has declined to enact and that this Court repeatedly has refused to sanction. The effect of the Court of Appeals' opinion, if allowed to stand, would be to sanction piecemeal, but cumulatively drastic, administrative expansion of permissible bank securities activities and inevitably to expand the caseload of the federal judiciary as review of these *ad hoc* rulings is sought.

Action by this Court also is essential to promote uniformity in the application of the Glass-Steagall Act to various schemes by banks to engage in the securities underwriting business and to reaffirm the primacy of the courts on questions of statutory construction. That two other courts of appeals have deferred to the Comptroller's regulatory excesses in the IRA arena (with disparate degrees of enthusiasm) shows how widespread the problem is; that they have done so on sharply different grounds from those adopted by the Comptroller and even the court below, and with sharply different implications for the sorts of exceptions to the Act's flat prohibitions that might be tolerated in the future, shows how great is the need for this Court's direction.[11] Guidance is needed not only to assist other courts currently facing the same issues,[12] but also to resolve the inconsistencies and contradictions

11. For example, the Comptroller has ruled that ERISA constitutes a new and specific express authorization for bank IRA mutual funds (73a), or confirms prior existing authorizations (40a-42a), or both (61a). While the Second Circuit has deferred to a modified variant of the Comptroller's "confirmation" theory (630 F. Supp. at 594), the D.C. Circuit (14a) and Ninth Circuit (slip op. at 5 n.2) have expressly held that ERISA simply is "not relevant" to the issue.

12. The Institute has challenged the Comptroller's ruling authorizing First Union National Bank, N.A. to enter the mutual fund business. *Investment Company Institute* v. *Clarke*, C.A. No. C-86-0032-17

that prevent the law, as it presently exists, from offering a meaningful instruction to the lower courts beyond the demonstrably unacceptable lesson that judges must endorse and defer to whatever excuse offered by the banking regulators seems best designed to rationalize a bank's latest wish to enter the securities underwriting business by some new scheme. *Cf. Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 150-51 (1963).[13]

As the Comptroller, the banking industry and the lower courts have recognized, the issues raised by this case are of enormous legal and economic significance and warrant plenary review by this Court.[14]

(W.D.N.C. filed Jan. 24, 1986). On July 30, 1986, the United States District Court for the Western District of North Carolina stated, during oral argument on the parties' cross-motions for summary judgment, that the court would grant the defendants' motions because it was unwilling to deviate from the trend of results established by the D.C., Ninth and Second Circuits. The court has yet to issue an opinion, however, explaining its rationale for upholding the Comptroller's First Union ruling.

13. That plainly is the message that the instant judgment has sent to the lower courts, as the decision in *Investment Company Institute* v. *Clarke*, Nos. 84-2622, 84-2623 (9th Cir. June 30, 1986) demonstrates. There, a sharply divided court reversed a district court opinion that had struck down the Comptroller's Wells Fargo and Bank of California rulings. Judge Reinhardt, in what might be subtitled the "Case of the Reluctant Majority," voted with Judge Norris to reverse only on the basis of the extreme and unprecedented deference analysis applied in the opinion of the District of Columbia Circuit at issue in this petition, and notwithstanding his own view that the Comptroller's analysis is "superficial," "come[s] perilously close to disregarding the spirit of *Camp* while purporting to adhere to its letter" and "comes perilously close to rejecting the division between commercial banking and investment banking that Congress sought to mandate in Glass-Steagall." *Id.*, slip op. at 3-4.

14. The Comptroller informed the lower courts that the issues presented here are of "great significance" to "the entire banking industry and the nation's financial community" (103a), while the American Bankers Association has stated that this case "[o]bviously" presents "an issue of nationwide importance" (109a, 115a). Judge Scalia, although joining in the judgment below, nonetheless declared that this case is "such an important one that it bears a petition for certiorari to the Supreme Court" (117a), while the Ninth Circuit agreed that the issues raised herein should be decided "ultimately [by] the Supreme Court" (113a).

I.

THE JUDGMENT BELOW EVISCERATES THE GLASS-STEAGALL ACT

A. The Judgment Below Authorizes Banks To Underwrite Securities In Direct Contravention Of This Court's Decision In *Camp* And The Will Of Congress By Endorsing A "Trust" Exception Predicated On Superficial Labels

The judgment below would permit the members of the nation's banking industry to create mutual funds seeking the $250 billion currently invested in IRAs as well as "trust" money of any sort. The Comptroller's newly-discovered "trust" exception also would free bank trust departments and the more than $800 billion under their management from the reach of the Act, permitting banks to underwrite securities of any type to the more than 240 million potential "trust" customers residing in the United States.

But, in forbidding national banks to underwrite "*any* issue of securities or stock" to "*any* extent whatever," 12 U.S.C. §§ 24 (Seventh), 378(a) (emphasis supplied), Congress made its policy choice in unmistakable, unqualified, and unequivocal terms. As this Court has stated, "[t]he Act's underwriting prohibition does not demonstrate any sensitivity to the characteristics of a particular issue [of securities]; the Act simply prohibits commercial banks from underwriting them *all*." *Becker, supra*, 468 U.S. at 152-53 (emphasis supplied).

Nonetheless, the Court of Appeals approved the Comptroller's implementation of a contrary policy by approving his whole-cloth creation of a "trust" exception to the Act. In doing so, the court below impermissibly ignored the substance of Citibank's securities underwriting activity and judicially repealed Congress' legislative directives. *SEC* v. *VALIC*, 359 U.S. 65 (1959).

This Court repeatedly has instructed that the prohibitions of the Glass-Steagall Act are to be interpreted in accordance with their plain language, and are not to be accorded a narrow or

technical meaning.[15] "[T]here is nothing in the phrasing of either § 16 or § 21 that suggests a narrow reading" of the term "'securities,'" *Camp, supra*, 401 U.S. at 635, nor that authorizes the Comptroller to give that term anything other than its "ordinary meaning." *Becker, supra*, 468 U.S. at 152. After *Camp*, there is simply no longer any room to doubt that "the business of a mutual fund" consists of "'selling' 'stock' or 'other securities' evidencing an undivided and redeemable interest in the assets of the fund," and that "[o]n their face, §§ 16 and 21 of the Glass-Steagall Act * * * prohibit this activity by national banks." *Camp, supra*, 401 U.S. at 625.

Despite these precepts, the court below erroneously attributed dispositive significance to the "trust" label Citibank placed upon the standardized, preprinted forms it required investors to sign concomitantly with the purchase of shares in its mutual fund. This Court made clear in *Camp*, however, that "legal trust form" is not a license to engage in the mutual fund business,[16] and that "Congress explicitly intended [the Act] to prohibit a national bank from operating an investment trust."[17] The court below simply abdicated its responsibility, as the actions of the SEC confirm, to ensure the Comptroller's fidelity to Congress' enactment and this Court's teachings.[18]

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15. *See Becker, supra*, 468 U.S. at 150; *Board of Governors, supra*, 450 U.S. at 65; *Camp, supra*, 401 U.S. at 635; *Board of Governors* v. *Agnew*, 329 U.S. 441, 446-47 (1947); *Awotin* v. *Atlas Exchange National Bank*, 295 U.S. 209, 212 (1935) (construing terms of the McFadden Act reenacted as part of the Glass-Steagall Act).

16. 42 Fed. Res. Bull. 288 (1956), *cited with approval in Camp, supra*, 401 U.S. at 621.

17. *Camp, supra*, 401 U.S. at 635.

18. Notwithstanding Citibank's use of trust form, the SEC adhered to this Court's decision in *Camp* and required Citibank to register its fund as a mutual fund under the Investment Company Act and to register the interests therein as "securities" under the Securities Act of 1933. Because the Glass-Steagall Act and the federal securities laws constitute "several pieces of legislation collectively designed to restore public confidence in financial markets," *Becker, supra*, 468 U.S. at 150, Citibank's decision to register the shares as "securities" under the securities laws provides "considerable evidence" that the shares constitute "securities" within the meaning of the Glass-Steagall Act. *Id. See also SEC* v. *United Benefit Life Ins. Co.*, 387 U.S. 202, 221 (1967); *SEC* v. *C.M. Joiner Leasing Corp.*, 320 U.S. 344, 353 (1943).

Nor is there any warrant for the Court of Appeals' effort "to narrow the ordinary meaning" of the term "securities" used in the Act on the basis of nonstatutory factors or to exclude securities from the Act's coverage because of the nature of the relationship between investors and the underwriting bank.[19] Apart from the fact that these efforts were tried and rejected in *Becker, supra*, 468 U.S. at 152, the "trust" factor invoked by the Comptroller and the Court of Appeals is wholly without substance, as betrayed by the very IRA accounts in issue here.

ERISA permits a bank to establish *identical* IRA accounts as *either* "trust" or "custodial" accounts.[20] And ERISA provides that an IRA "custodial" account "shall be treated as a trust" and the custodian "treated as the trustee thereof." I.R.C. § 408(h). Yet, even the Comptroller has conceded that banks may not underwrite common trust fund shares to IRA "custodial" customers as investments (111a n.10), while the banking industry has acknowledged that "[a] common investment fund in which custodial IRA accounts are commingled would seem to be indistinguishable from the commingled fund in which agency accounts had been invested by [Citibank] in [*Camp*]."[21]

19. The court below mistakenly eschewed adherence to *Camp*, *Becker* and the Act's plain language because of its fear that following those cases would prohibit "all commingling of trust funds by national banks" (11a). The Glass-Steagall Act, however, does not prohibit national banks from having "any connection with" securities; it prohibits banks from engaging "in the business" of "issuing, underwriting, selling, or distributing" them to the public, and a bank does not engage in these prohibited activities when it simply commingles the assets of preexisting trusts in a common trust fund. The Court of Appeals confused the question of whether shares in a common trust fund are "securities" with the separate question of whether the activity in which a bank engages with respect to those securities violates the Act's flat underwriting bar.

20. An IRA account is a creature of the tax law designed to serve the tax-related purpose of segregating and earmarking an eligible taxpayer's IRA investments and the income they generate, *see* I.R.C. § 408(a)(1), and of lodging in the account custodian or trustee the obligation to inform the IRS of the status of the account and of distributions therefrom, *see* I.R.C. § 408(i).

21. *Response of the American Bankers Association to the Securities Activities of Commercial Banks Study Outline* 73 (May 1976). Moreover, although Congress authorized IRAs in 1974, it was not until 1982 that national banks ever attempted to sponsor any sort of IRA

Of course, the Glass-Steagall Act nowhere distinguishes between mutual fund shares which are underwritten pursuant to standardized, preprinted *custodial* forms and those which are underwritten pursuant to standardized, preprinted *trust* forms. As noted in *Becker*, "the Act simply prohibits commercial banks from underwriting them all." *Becker, supra*, 468 U.S. at 136-37. And, when Congress wants to create exceptions to the Act's flat prohibitions, it does so itself by amending the Glass-Steagall Act. *Becker, supra*, 468 U.S. at 154. There is no "trust" exception in the Act, however, nor anything even closely resembling one.[22] By concluding that trust labels somehow might transform Citibank's mutual fund into something other than securities underwriting activity, the court below impermissibly sacrificed Congress' substantive policy goals and this Court's prior decisions to matters of form and the ingenuity of bank counsel.

B. By Approving The System Of *Ad Hoc* Administrative Regulation Previously Rejected By Congress And This Court, The Judgment Below Licenses Underwriting Activities That Foster The Very Hazards Congress Intended The Glass-Steagall Act To Eliminate

This case also raises basic questions concerning the authority of federal administrative agencies to rewrite Acts of Congress wholesale in order to expand their regulatory ambit in pursuit of their own policy objectives. The Comptroller has made plain his

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mutual fund and to underwrite the funds' shares as IRA investments. As this Court declared in *Becker*, that fact itself demonstrates that "when Congress sought to 'separat[e] as completely as possible commercial from investment banking,' * * * the banks regulated by the Act universally recognized that underwriting [IRA mutual fund shares] falls on the investment-banking side of the line." *Becker, supra*, 468 U.S. at 160. *See also BankAmerica Corp.* v. *United States*, 462 U.S. 122 (1983).

22. Rather, as this Court held in *Camp*, the Act flatly prohibits banks from "embarking upon what would be in effect the sale of participations in a Common Trust Fund to the public as investments." *Camp, supra*, 401 U.S. at 621, 638 n.37 (quoting 26 Fed. Res. Bull. 393 (1940)).

disagreement with the basic Congressional policy choices embodied in the Glass-Steagall Act (94a-100a), and publicly has committed his Office to assisting those banks that choose "not to 'wait for Congress to change the [Glass-Steagall Act] * * * to offer new products,'" a posture that the ruling under review puts into practice.[23] In fact, ever since Congress enacted ERISA in 1974, the nation's banking industry and the Comptroller have repeatedly urged Congress to amend the Glass-Steagall Act in ways which would permit banks to create IRA mutual funds and to underwrite their shares to the public. To date, however, Congress steadfastly has declined this invitation.[24]

Notwithstanding Congress' considered legislative judgment, the Court of Appeals affirmed the Comptroller's decision administratively to rewrite the Act to permit banks to operate mutual funds. That decision was impermissible for two fundamental reasons. First, the court below erroneously assumed that its *ad hoc* evaluation of the likelihood of risk inherent in the particular bank mutual fund at issue should assume primacy over Congress' deliberate generic judgment that, "[w]hen a bank puts itself in competition with mutual funds, the bank must make an accommodation to the kind of ground rules that Congress firmly concluded could not be prudently mixed with the business of commercial banking." *Camp, supra*, 401 U.S. at 637. Second, the court below improperly assumed it could disregard *Camp*'s

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23. *New Bank Powers Unlikely But Farm Debt, Court Ruling Could Spur Congress to Act*, Wash. Fin. Rep., Feb. 25, 1985, at 346.

24. *See, e.g.*, S. 1720, 97th Cong., 1st Sess. § 302 (1981); S. 2490, 97th Cong., 2d Sess. § 10 (1982); S. 2181, 98th Cong., 1st Sess. § 104(c) (1983); S. 2851, 98th Cong., 2d Sess. (1984). As Congress was advised:

> As a consequence of [the *Camp*] decision, banks * * * have not been able to provide a securities investment vehicle for their IRA customers, but rather have had to limit their service to a deposit account. With the mutual fund authority contained in S. 1720, a bank could provide to the smaller investor * * * a broader range of investment options.

Hearings on S. 1686, S. 1703, S. 1720 and S. 1721 Before the Senate Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, Part II, 97th Cong., 2d Sess. 419 (1981) (testimony of the American Bankers Association).

teachings by relying on the Comptroller's self-proclaimed regulatory power, as well as on the presumed self-restraint of Citibank, to ameliorate the dangers inherent in bank mutual fund activities.[25]

But, when Congress wants to give banking agencies regulatory authority over particular non-banking activities, it knows how to do so and does so expressly. *See* 12 U.S.C. § 1843 (c)(8). It did not do so in the Glass-Steagall Act. *Becker, supra*, 468 U.S. at 154. Indeed, in 1935 Congress expressly refused to permit national banks, "*under regulation by the Comptroller of the Currency*, to underwrite and sell" various securities, *see* H.R. Conf. Rep. No. 1822, 74th Cong., 1st Sess. 53 (1935) (emphasis supplied), and as recently as 1980 Congress expressly reaffirmed its withholding of any and all regulatory power from the Comptroller with respect to "the securities activities of National Banks under the Act commonly known as the 'Glass-Steagall Act.'" *See* 12 U.S.C. § 93a. The Court of Appeals simply disregarded this Court's admonitions that "Congress rejected a regulatory approach" when it drafted the Glass-Steagall Act and that "[C]ongress has adhered to that rejection ever since." *Becker, supra*, 468 U.S. at 153.

Contrary to the premise of the court below (22a-23a), Congress did not reject a scheme of ongoing federal oversight because of concerns over whether supervision should take place under "general regulatory authority" or "specific, existing regulations." Congress rejected a regulatory approach because it determined that the very combination of commercial and investment banking activities presents temptations which may be too powerful for even conflict-conscious bankers to resist, and which are too pervasive in scope and too subtle in effect for even vigilant regulators to

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25. The court's observation that "if *Citibank* decides that its fund is becoming too risky, or is perceived by the public as too risky, the bank can gradually scale down the program by the simple expedient of diminishing its marketing efforts and retiring any units presented for redemption" (10a) (emphasis supplied) may reflect a desirable policy, but it is not the one Congress has selected. The Glass-Steagall Act reflects Congress' decision to opt for flat prohibitions, not administrative regulation or industry self-restraint. *Becker, supra*, 468 U.S. at 153-54.

control. *Becker, supra*, 468 U.S. at 147-48. Administrative regulation of any sort and in any form could at best only *reduce* the potential dangers; Congress therefore opted for a prophylactic remedy that would *eliminate* the very *possibility* of abuse. *Id.*; *Board of Governors* v. *Agnew*, 329 U.S. 441, 449 (1947). By acquiescing in the Comptroller's disregard of this threshold legislative judgment, the Court of Appeals simply permitted the Comptroller to substitute his own policy choice for that made by Congress, and sanctioned underwriting activities that indisputably create hazards of the precise type Congress enacted the Glass-Steagall Act to eliminate altogether, rather than to ameliorate to a greater or lesser degree on an *ad hoc* basis.

II.

THE JUDGMENT BELOW REPUDIATES BOTH THE GLASS-STEAGALL ACT AND THIS COURT'S DECISIONS IN *CAMP* AND *BECKER* BY ALLOWING BANK REGULATORS TO USURP A POLICY-MAKING ROLE CONGRESS EXPRESSLY RESERVED FOR ITSELF

The Comptroller's recent spate of IRA mutual fund rulings do not represent an isolated campaign by a single banking regulator. Under increasing pressure from the institutions they regulate, the federal banking agencies have responded to Congress' refusal to amend the Glass-Steagall Act by simply rewriting it themselves. Thus,

> —although this Court held in *Becker* that Bankers Trust's marketing of commercial paper securities gives rise to all the dangers Congress enacted the Glass-Steagall Act to prevent, the Federal Reserve Board has issued a ruling reapproving Bankers Trust's commercial paper operations;[26]

26. *Commercial Paper Activities of Bankers Trust Company of New York Do Not Constitute Underwriting Securities*, [1984-85 Transfer Binder] Fed. Bank. L. Rep. (CCH) ¶ 86,270 (June 4, 1985). The United States District Court for the District of Columbia promptly struck down the ruling, *Securities Indus. Ass'n* v. *Board of Governors*, 627 F. Supp. 695 (D.D.C. 1986), and the case presently is on appeal

—although the Act prohibits depository institutions from underwriting securities "to any extent whatever," the Federal Deposit Insurance Corporation has held that banks may underwrite securities through shell subsidiaries created solely to evade the strictures of the Act;[27] and

—although the Act flatly prohibits banks from selling, distributing or underwriting "bonds," the Comptroller nonetheless has authorized banks to sell, distribute and underwrite bonds which are partially collateralized by mortgages.[28]

Moreover, further requests for rulings to engage in securities underwriting activities forbidden by the plain language of the Act's flat prohibitions are presently pending before the bank regulators.[29] Apart from the litigation these administrative exercises of legislative authority ineluctably generate, efforts to dismantle the Glass-Steagall Act by administrative fiat have triggered a veritable flood of additional revisionist activity and have inflicted serious damage upon the carefully balanced and intertwined statutory scheme Congress legislated to govern the securities and banking industries.[30]

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before the District of Columbia Circuit. *Securities Indus. Ass'n* v. *Board of Governors*, Nos. 86-5089, 5090, 5091, 5139 (D.C. Cir.).

27. *FDIC Statement of Policy on the Applicability of the Glass-Steagall Act to Securities Activities of Subsidiaries of Insured Nonmember Banks*, 47 Fed. Reg. 38,984 (1982). The ruling is under challenge. *Investment Company Institute* v. *FDIC*, 606 F. Supp. 683 (D.D.C. 1985), *appeal pending*, Nos. 84-1616, 85-5769 (D.C. Cir.).

28. *Letter No. 362*, [Current] Fed. Bank. L. Rep. (CCH) ¶ 85,532 (May 22, 1986).

29. For example, several banks have applied to the Federal Reserve Board to underwrite a whole host of securities through non-bank holding company subsidiaries, while other banks have made known their intent to seek even greater powers in the event the applications are granted. *See, e.g., Banks Will Seek New Authority From Fed If Securities Applications Are Approved*, Wash. Fin. Rep., May 26, 1986, at 893.

30. For example, because Congress understood the Glass-Steagall Act to foreclose banks from engaging in the securities underwriting business, Congress excepted banks from the definition of the terms "broker" and "dealer" in the Securities Exchange Act of 1934. *See* 15 U.S.C. §§ 78c(4),(5). In light of the recent rulings of the federal banking agencies, however, the SEC has administratively repealed the exception Congress wrote into the statute. *See* 48 Fed. Reg. 51,930 (1983). Although the SEC's rule was unsuccessfully challenged by the

Notwithstanding the frontal challenge to the Act's flat prohibitions embodied in the ruling under review, the court below upheld the Comptroller's statutory construction merely because it was presented in a written document and because the document advanced "plausible reasons" for the Comptroller's contrary views (23a). In doing so, the court abdicated the judiciary's fundamental responsibility "to construe the language employed by Congress." *Zuber* v. *Allen*, 396 U.S. 168, 193 (1969). Administrative deference requires more than a court's ability "to 'conceive a basis' for administrative action." *Bowen* v. *American*

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banking industry, the litigation remains in the courts. *See American Bankers Ass'n* v. *SEC*, C.A. No. 85-2482 (D.D.C. Oct. 30, 1985), *appeal pending*, No. 85-6055 (D.C. Cir.).

Moreover, should this Court sustain the Comptroller's ruling in this case, similar statutory surgery can be expected by the SEC. In 1970, Congress specifically amended the Investment Advisers Act of 1940, 15 U.S.C. §80b-1 *et seq.*, ("Advisers Act") to require that all investment advisers to mutual funds register as "investment advisers" with the SEC, thereby subjecting them to the regulatory regime of that law. *See* H.R. Rep. No. 1382, 91st Cong., 2d Sess. 13, 39 (1970). Consistent with the preexisting statutory pattern which contemplated a total separation between the banking and securities industries, however, Congress permitted banks to retain their exemption from registration under the Advisers Act. 15 U.S.C. §80b-2(a)(11); *see* H.R. Conf. Rep. No. 1631, 91st Cong., 2d Sess. 28-29 (1970). As a result, Citibank has not registered under the Advisers Act, even though it now is an investment adviser to a registered mutual fund. The result is that, unless the SEC administratively acts to fill the regulatory void by amputating the statutory exception for banks, investors in Citibank's mutual fund will be deprived of the very protections that Congress in 1970 decided should be extended to all mutual fund investors.

Even if the SEC assumes the authority to strip the Advisers Act of its bank exemption, however, this administrative revision of the statutory structure would still not suffice, in the view of the SEC, adequately to protect investors in bank sponsored mutual funds. Two successive SEC Chairmen have informed Congress that the existing federal securities laws, even if applied to bank mutual funds, are not adequate to cope with the unique conflicts of interests and other financial dangers which would arise from the entry of banks into the mutual fund business. *See, e.g., Hearings on S.1686, S. 1703, S.1720 and S.1721 before the Senate Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs, Part II*, 97th Cong., 2d Sess. 914 (1981) (Statement of SEC Chairman John S.R. Shad); *Hearings on H.R. 1539, H.R. 2747 and H.R. 2856 before the House Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 96th Cong., 2d Sess. 17 (1979) (Statement of SEC Chairman Harold W. Williams).

Hospital Association, 106 S.Ct. 2101, 2112 (1986). Indeed, only last Term this Court reaffirmed that "[a]gency deference has not come so far" as to amount to the virtual "*carte blanche*" extended to the Comptroller by the court below. *Id.* at 2122.[31] The judgment below represents nothing less than "judicial inertia resulting in the unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965).

The nature of the ruling under review confirms that the Court of Appeals' refusal to perform the "quintessential judicial function" of statutory construction was particularly mistaken here. *BATF* v. *FLRA*, 464 U.S. 89, 98 n.8 (1983). While this Court has recognized that judicial restraint might be appropriate in evaluating agency decisions which reflect a cautious or limiting construction of agency authority *vis-a-vis* coordinate branches of the federal government or the States, this Court consistently has insisted upon close scrutiny of agency decisions which, as here, reflect self-aggrandizing bureaucratic behavior dismissing Congress' fundamental policy decisions and objectives.[32] The Comptroller's transformation of a clear, proscriptive statute broadly forbidding bank securities activities into a regulatory statute permitting their *ad hoc* administrative authorization, based upon the agency's own assessment of the risks and dangers involved, and notwithstanding Congress' refusal to grant regulators such authority in the first place, plainly demanded heightened, not relaxed, judicial review.[33]

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31. A "reviewing court '*must* reject administrative constructions of [a] statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.'" *Becker, supra*, 468 U.S. at 143 (quoting *Federal Election Comm'n.* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31 (1981)).

32. *Compare Federal Deposit Ins. Corp.* v. *Philadelphia Gear Corp.*, 106 S. Ct. 1931 (1986) *and Northeast Bancorp, Inc.* v. *Board of Governors*, 105 S. Ct. 2545 (1985) *with NLRB* v. *Financial Institute Employees*, 106 S. Ct. 1007 (1986); *Board of Governors* v. *Dimension Fin. Corp.*, 106 S. Ct. 681 (1986); *Lowe* v. *SEC*, 105 S. Ct. 2557 (1985), *and Becker, supra*, 468 U.S. at 142-44.

33. *See* 12 U.S.C. § 93a; *Becker, supra*, 468 U.S. at 153-54.

Even beyond the improper standard applied by the Court of Appeals, the deference accorded the Comptroller's ruling is untenable. The rationales proffered by the Comptroller in support of bank-operated IRA mutual funds have so changed over time and so differed from ruling to ruling that they do not reflect the consistency this Court has required as a prerequisite to any judicial deference. *Bowen* v. *American Hospital Association, supra*, 106 S.Ct. at 2122 n. 34.[34] And the Court of Appeals deferred in important respects not to any reasoned application of agency "expertise" embodied in the Ruling under review, but essentially to bald and unsupported statements in the Comptroller's ruling and to the *post hoc* rationalizations of the Comptroller's litigation counsel.[35]

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34. The efforts of the Comptroller and his counsel to avoid the fatal impact of the federal securities laws upon the Comptroller's IRA mutual fund rulings provide a good case in point. In his Citibank ruling, the Comptroller agreed that the term "securities" as used in the federal securities laws and the Glass-Steagall Act generally are "synonymous" (44a), but nonetheless declined to apply the securities laws so as not to undermine his position that the shares in the Citibank mutual fund represent only "the formal manifestation of a traditional banking service" (44a). In the district court, counsel for the Comptroller abandoned this rationale and argued, relying upon the Court of Appeals opinion in *Becker*, that the federal securities laws are irrelevant because the securities laws and the Glass-Steagall Act supposedly were intended to serve completely unrelated purposes. *Defendants' Memorandum of Points and Authorities In Support of Their Motion for Summary Judgment* at 17-18. The Comptroller subsequently adopted his counsel's view in the Wells Fargo IRA mutual fund ruling (65a-66a). Counsel in turn abandoned the Comptroller's position during the Wells Fargo litigation after this Court handed down its decision in *Becker*. *Defendants' Reply Brief* at 24. Then, following issuance of the district court opinion in the Ninth Circuit Wells Fargo case, counsel finally adopted the rationale that the federal securities laws are irrelevant in construing the Glass-Steagall Act because the securities laws definitions are overinclusive. The Court of Appeals in this case approved this most recent formulation (11a).

35. The Court of Appeals' opinion bears only faint resemblance to the Comptroller's ruling. For example, the Comptroller devoted much of his ruling to demonstrating how ERISA allegedly confirms his authorization of Citibank's latest mutual fund (40a-42a), while the court below expressly held that ERISA is "not relevant" to the issues raised by this case (14a). The Comptroller also devoted several pages of his ruling to a blistering attack on the SEC's "unwavering position" that bank common trust funds which are mass-merchandised to the

Under these circumstances, the Court of Appeals' failure to honor its Article III responsibilities transformed the practice of judicial deference to agency actions in areas committed to agency expertise into an excuse for judicial adbication to an agency's arrogation of power inconsistent with Congress' own substantive and structural plan. The court's answer that Congress "remains free to address the issue if it finds itself in disagreement with the actions of the Comptroller or the courts" (23a n.12) just will not do. If existing banking statutes do not serve the public interest, "that is a problem for Congress, and not the [banking agencies] or the courts, to address." *Board of Governors* v. *Dimension Financial Corp., supra*, 106 S.Ct. at 689.

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public as investment vehicles must be registered under the federal securities laws (45a-50a) (an attack the Comptroller subsequently and expressly disavowed during the Second Circuit litigation (106a)), whereas the court below properly accepted the SEC's interpretation of its own organic statutes. Finally, although the court below discussed all (and even purported to defer to the Comptroller on some) of these matters, the remaining pages of the Comptroller's ruling do not even attempt to analyze the language or legislative history of the Glass-Steagall Act (42a-43a), do not mention, much less discuss, the four characteristics which the court below apparently believed to render Citibank's IRA mutual fund "less risky" than the Citibank mutual fund at issue in *Camp* (44a-45a), and do not even inquire into the ability of Citibank to satisfy its fiduciary obligations in light of the Comptroller's unprecedented waiver of his own fiduciary regulations to permit Citibank to transfer exclusive fund management to the fund's Supervisory Committee in accordance with the requirements of the Investment Company Act (50a-51a).

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should be granted.

Respectfully submitted,

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